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No. 82-1584

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE SCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

Department of Justice
Washington D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in admitting the government's videotapes of meetings between petitioner and a Drug Enforcement Administration agent.

2. Whether the district court properly required petitioner to authenticate his proffered physical evidence.

3. Whether petitioner was denied his rights under the Speedy Trial Act.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1983. On March 7, 1983, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 22, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to manufacture Schedule II controlled substances, in violation of 21 U.S.C. 846, and of traveling in interstate commerce with the intent to promote the manufacture

and distribution of those drugs, in violation of 18 U.S.C. 1952 and 2. Petitioner was sentenced to two concurrent terms of four years' imprisonment.

1. The evidence at trial showed that from December 1980 through February 1981, Drug Enforcement Administration agent Joseph Vigna worked in an "underground" chemical store in Hillside, New Jersey, that was established by the DEA to identify individuals who were supplying or operating illegal clandestine drug laboratories. On December 3, 1980, Agent Vigna received a telephone call from co-defendant Samuel Allen, who stated that he was interested in buying ephedrine, an ingredient used in the production of methamphetamine.[1] The next day, in a videotaped meeting, petitioner, Allen, and Agent Vigna discussed the purchase of ephedrine and phenyl aniline (a drug used as a "cutting" agent for other drugs), as well as the acquisition of a chromographic slide of phenyl-2-propanone (P-2-P) to compare with the product Allen and petitioner expected to produce (Nov. 30, 1981 Tr. 18-29; II Tr. 10-29, 31-33, 41-42).

On six more occasions during the next five months, either petitioner and Allen or Allen alone met at the store with Agent Vigna, who attempted to videotape all of those meetings. On December 11, 1980, Agent Vigna and Allen discussed the manufacture of P-2-P (Nov. 30, 1981 Tr. 31, 33, 40-42). At meetings on January 9 and 23, 1981, all three men discussed the purchase of additional ephedrine, as well as glassware used in the manufacture of drugs, additional chemicals used in the manufacture of methamphetamine, and various formulas for making methamphetamine (II Tr. 47-95, 96-134). And on January 29, petitioner and Vigna discussed the purchase of sodium acetate, a chemical used in the production of P-2-P (Nov. 30, 1981 Tr. 60; II Tr. 136-151).

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[1]Allen pleaded guilty on September 21, 1981.

In February 1981, William Reich, an unindicted co-conspirator, agreed to produce methamphetamine using the chemicals and lab equipment provided by petitioner. Petitioner delivered to Reich mercuric chloride, P-2-P, methylamine, and hydrochloric acid, and three days later petitioner received a batch of methamphetamine in return. Throughout March and April, petitioner delivered additional chemicals to Reich and received his share of the methamphetamine produced. On April 22, 1981, Reich was arrested (V Tr. 35-37, 39-42, 45-50).

Agent Vigna and Allen met two more times at the chemical company on May 1 and 4, 1981. Allen was arrested during the May 4 meeting, and an arrest warrant was issued for petitioner the next day (Nov. 30, 1981 Tr. 66-67).

2. Prior to trial, petitioner moved to suppress the videotapes of all seven meetings at the chemical store on the ground that the government had not demonstrated that the tapes were authentic and trustworthy. Although the meetings of December 4, January 9, and January 29 had been recorded in their entirety, the January 23 tape ended before the meeting's conclusion. In addition, the December 11 meeting had not been taped.

At a hearing conducted by the magistrate, Agent Vigna testified that the tape of the January 23 meeting had ended before the meeting's conclusion because the machine had run out of tape (Nov. 16, 1981 Tr. 27-28). Agent Vigna stated that he had attempted to record the December 11 meeting but apparently had failed to activate the machinery (*id.* at 24-25). He also recounted his training and experience in the use of the videotaping equipment, the installation of the equipment at the chemical company, and the custody and control of the completed recordings (*id.* at 8-10, 12-23, 15, 17-36). Based on the evidence adduced at the hearing,

the magistrate found no government bad faith or willful misconduct that would justify suppressing the tapes. The district court adopted the magistrate's findings, and the tapes of the four meetings attended by petitioner were admitted into evidence.

3. Six days prior to the scheduled trial date of September 12, 1981, petitioner dismissed his attorney. At a hearing on the attorney's motion to withdraw, the district court learned that petitioner intended neither to be represented by an attorney nor to represent himself at trial. Instead, petitioner informed the court that he intended to present no defense whatsoever (Sept. 16, 1981 Tr. 13-14). At the conclusion of the hearing, it appeared to the district court, the prosecutor, and the defense attorney that there were reasonable grounds to question petitioner's competency. The district court accordingly ordered that petitioner submit to a competency study pursuant to 18 U.S.C. 4244 (Sept. 16, 1981 Tr. 22-23).

Six days later, petitioner's former attorney filed a notice of appearance reinstating himself as petitioner's counsel and moved for reconsideration of the commitment order and an expedited trial. Following a hearing, the district court modified the terms of the previous order and directed that petitioner be held without bail at a local correction center from which he would be released to undergo psychiatric examination (Sept. 23, 1981 Tr. 8, 11, 19, 22-26). The court of appeals later stayed the portion of the order revoking petitioner's bail, and he was released. On October 12, 1981, he was examined by a psychiatrist, who determined that he was competent to stand trial.

On October 29, 1981, petitioner retained new counsel and thereafter filed a motion to dismiss the indictment on speedy trial grounds. The motion was denied (Nov. 6, 1981 Tr. 9-10), and trial commenced on November 30, 1981.

ARGUMENT

1. Relying on *United States* v. *Starks*, 515 F.2d 112 (3d Cir. 1975), petitioner argues (Pet. 9-10) that none of the four videotapes of his meetings with the DEA agent was admissible.[2] He contends that the government's failure to record one full meeting and part of another demonstrates that the tapes as a whole were inaccurate and inauthentic. Contrary to petitioner's argument, however, the evidence adduced at the hearing on the tapes' authenticity demonstrated that the videotapes were authentic, accurate, and trustworthy.

It is well settled that incomplete or partially unintelligible tape recordings are admissible unless the missing or unintelligible portions are so substantial that they render the recordings untrustworthy as a whole. See, *e.g.*, *United States* v. *Ruppel*, 666 F.2d 261, 272 (5th Cir. 1982); *United States* v. *Nicoll*, 664 F.2d 1308, 1314 (5th Cir.), cert. denied, 457 U.S. 1118 (1982); *United States* v. *Bell*, 651 F.2d 1255, 1259 (8th Cir. 1982); *United States* v. *Slade*, 627 F.2d 293, 301-302 (D.C. Cir.), cert. denied, 449 U.S. 1034 (1980); *United States* v. *Greenfield*, 574 F.2d 305, 307 (5th Cir. 1978), cert. denied, 439 U.S. 860 (1979). In the instant case, it is clear that the district court did not abuse its discretion by concluding that the tapes as a whole were admissible despite the failure to record the December 11 meeting and part of the meeting of January 23. Agent Vigna

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[2]In *Starks*, *supra*, 515 F.2d at 121 n.11, the Third Circuit set forth seven criteria, originally adopted in *United States* v. *McKeever*, 169 F.Supp. 426, 430 (S.D.N.Y. 1958), for determining the admissibility of tape recordings: (1) whether the recording device was capable of taping the conversation offered into evidence; (2) whether the operator of the device was competent to operate the device; (3) whether the recording is authentic and correct; (4) whether changes, additions or deletions have been made in the recording; (5) whether the recording has been preserved in a manner that is shown to the court; (6) whether the speakers are identified; and (7) whether the conversation elicited was made voluntarily and in good faith and without any kind of inducement.

explained that the December 11 meeting had not been recorded for the simple reason that he did not successfully activate the machine and that the January 23 tape ended before the meeting's conclusion because the videotape machine had run out of tape and he could not insert a new cassette in the presence of petitioner and Allen (Nov. 16, 1981 Tr. 24-25, 27). In these circumstances, the district court properly adopted the magistrate's finding that the videotape evidence was accurate and trustworthy (I Tr. 5).

2. Petitioner next claims (Pet. 10-11) that the district court erred in excluding defense testimony about unused chemicals and equipment. The record demonstrates, however, that petitioner failed properly to authenticate the evidence he wished to introduce.

As part of his defense, petitioner sought to introduce the expert testimony of a chemist concerning his analysis of certain chemicals and glassware. It was petitioner's contention that all the materials he had purchased from Agent Vigna remained unused, but he was unable to establish an unbroken chain of custody (V Tr. 154-155). The district court prevented the chemist from testifying about the materials because petitioner failed to demonstrate that the chemicals analyzed by the expert were the same chemicals that petitioner had purchased from Agent Vigna. The court rejected petitioner's arguments that a defendant is not obligated to authenticate evidence in accordance with the Federal Rules of Evidence and that the question of authenticity should be left for the jury (V Tr. 152-160). Thereafter, petitioner made no effort to authenticate the physical evidence, through either his own testimony or that of other witnesses.

The district court's ruling was correct. There is no authority for the proposition that the Federal Rules of Evidence do not apply to defendants (see Rule 1), and authentication is a preliminary question for the court, not the jury (Rules

104(a) and 901). Absent an abuse of discretion, a trial judge's ruling on authentication will not be disturbed. *United States* v. *Brewer*, 630 F.2d 795, 802 (10th Cir. 1980); *United States* v. *Luna*, 585 F.2d 1, 6 (1st Cir.), cert. denied, 439 U.S. 852 (1978). In the instant case, petitioner failed to establish a proper chain of custody or otherwise to show that the materials examined by the chemist were the same ones that petitioner purchased from agent Vigna; hence, the district court did not abuse its discretion in excluding the expert's testimony regarding those items.[3]

3. Petitioner next contends (Pet. 13-15) that the period of time during which he was forced to undergo a competency examination was not properly excludable under the Speedy Trial Act, 18 U.S.C. (& Supp. V) 3161 *et seq.* Petitioner's argument is without merit. Section 3161(h)(1)(A) specifically excludes any "delay resulting from any proceeding, including any examinations, to determine the mental competency of the defendant." See also 18 U.S.C. 3161(h)(4).

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[3]Contrary to petitioner's claim, the district court did not require petitioner to take the stand in order to authenticate the materials. Rather, the court observed that if petitioner was the only witness who could authenticate the items in question, petitioner would have to decide whether to take the stand in order to do so (V. Tr. 160-161).

The cases upon which petitioner relies (Pet. 10) also do not show that his incomplete chain of custody provided adequate authentication. In *United States* v. *Johnson*, 637 F.2d 1224 (9th Cir. 1980), the evidence submitted—an ax—was readily recognizable, and therefore the testimony needed to authenticate it was very different from that required to authenticate fungible items such as chemicals. In *United States* v. *Cyphers*, 553 F.2d 1064 (7th Cir.), cert. denied, 434 U.S. 843 (1977), the items were admitted because the government had maintained a proper chain of custody. And in *United States* v. *Goichman*, 547 F.2d 778, 782-784 (3d Cir. 1976), a document was held to have been properly admitted because it was certified as part of the record of prior court proceedings involving the defendent, contained authenticating information, and was corroborated by other documents. None of those cases is at all similar to this one.

In addition, contrary to petitioner's claim, the district court acted properly in ordering the competency examination. Under 18 U.S.C. 4244,[4] the court was required to direct the accused to submit to a mental examination if the government or the court itself had reasonable grounds to believe that the defendant was insane or so mentally incompetent as to be unable to understand the proceedings against him.[5] In this case petitioner's bizarre behavior in the courtroom prompted his own attorney, the prosecutor, and the judge all to question his competency (Sept. 16, 1981 Tr. 14, 20-22). Thus, the court properly ordered an examination of petitioner's mental competency. And even if the court had erred in this regard, petitioner cites no authority for the proposition that such an error would preclude the exclusion of otherwise excludable delay.[6]

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[4]18 U.S.C. 4244 states in pertinent part:

> Whenever after arrest and prior to the imposition of sentence * * * the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused * * *. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused * * * to be examined as to his mental condition * * *.

[5]For example, petitioner stated he was dispensing with legal representation in order to commit "judicial suicide" and that despite the dismissal of his attorney he wished "to have motions filed on [his] behalf" and to require the government to "prove the answer to those motions" (Sept. 16, 1981 Tr. 14, 20-22).

[6]There is also no merit to petitioner's contention (Pet. 11) that he was effectively denied the right to testify because the district court stated that his prior criminal convictions could be admitted for impeachment under Fed. R. Evid. 609(a). The court had previously ruled that if petitioner did not testify the convictions would not be admitted to show his intent (Fed. R. Evid. 404(b)) because their probative value would be outweighed by their prejudicial effect (Fed. R. Evid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JANIS H. KOCKRITZ
Attorney

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403). But the court ruled that if petitioner took the stand, the convictions could be admitted for impeachment (see V Tr. 2-23, 166). This ruling was based upon the court's implicit finding that if petitioner testified, the convictions' probative value would outweigh their prejudicial effect. This fact-bound question does not warrant review by this Court. And assuming the correctness of the court's evidentiary ruling, it is clear the petitioner's right to testify was not abridged. "A defendant may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics." *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980).

Likewise, petitioner was not improperly precluded from presenting critical expert testimony, as he claims (Pet. 11-12). Petitioner proposed to introduce the testimony of a chemist who would state, based upon a viewing of the videotapes, that petitioner lacked the intent or capability to manufacture methamphetamine (V Tr. 145, 148; VI Tr. 56-63). The court properly exercised its discretion under Fed. R. Evid. 702 in ruling that the chemist lacked special expertise regarding these matters and that, in any event, these issues should be left for the jury. See *United States* v. *Bright*, 517 F.2d 584, 586 (2d Cir. 1975) (psychiatrist prohibited from testifying concerning defendant's ability to know whether checks were stolen).

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